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FEB 10 1945

CHARLES ELMORE GROPLEY  
CLERK

(26) **SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1944**

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**No. 940**

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**THE CITY OF ORANGEBURG,**

*Petitioner,*

*vs.*

**THE SOUTHERN RAILWAY COMPANY.**

—

**PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE FOURTH CIRCUIT.**

—

JULIAN S. WOLFE,  
HUGO S. SIMS,  
*Counsel for Petitioner.*



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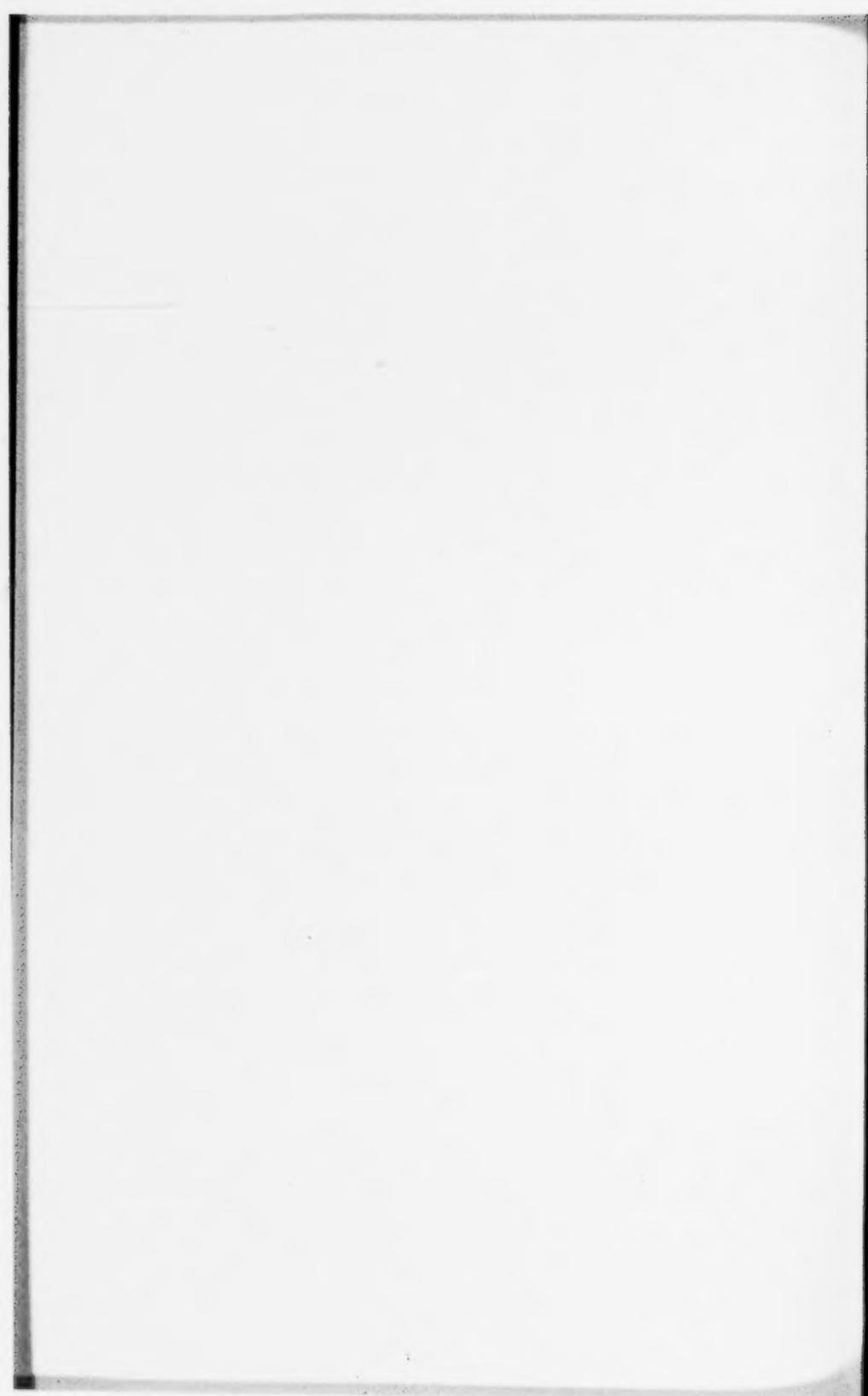
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The City of Orangeburg, by its attorneys, Hugo S. Sims and Julian S. Wolfe, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fourth Circuit entered in the above entitled case on November 11, 1944.

**Opinions Below**

The restraining order issued by the District Court for the Eastern District of South Carolina may be found at R-1.

Opinion of the District Court for the Eastern District of South Carolina may be found in 45 Fed. Sup. 734 (R. 2-14).

The opinion of the United States Circuit Court of Appeals for the Fourth Circuit in 134 Fed. Rep. (2nd) 890 (R. 25-32).

The opinion of the District Court for the Eastern District of South Carolina in 55 Fed. Sup. 167. (R. 45-53).

Opinion of the District Court for the Eastern District of South Carolina in 55 Fed. Sup. 171. (R. 53-74).

Finding of Fact R. 74-75.

Conclusions of Law R-76.

Order R. 69-70.

Opinion of the United States Circuit Court of Appeals for the Fourth Circuit (R. 94-102) is not yet officially reported.

### **Jurisdiction**

The judgment of the Circuit Court of Appeals was entered on November 11, 1944, and the jurisdiction of this court is invoked under the provisions of Section 240(a) of the Judicial Code, 28 U. S. C. 347(a), as amended, by a petition for a writ of certiorari presented on February 10, 1945.

The cause involves the interpretation of Article X, section 16, Constitution of South Carolina of 1895 (R. 34); Act No. 345, Acts of 1915, page 586, of the General Assembly of the State of South Carolina (29 Stat. at Large 586) (R. 34-35); an Ordinance of the City of Orangeburg, South Carolina (R. 35-38).

The constitutional provision authorizes the City of Orangeburg "to levy an assessment upon abutting property for the purpose of paying for permanent improvements on streets immediately abutting on such property" and provides for the consent of a majority of the owners of the abutting property and that the corporate authorities pay at least one-third of the costs of such improvements.

Act No. 345 follows the wording of the constitutional provision above summarized.

The Ordinance of the City of Orangeburg levies an assessment upon abutting property in accordance with the constitutional and statutory authority hereinabove cited and provides that "each owner of the property so assessed may within thirty days after the completion and acceptance by City Council of such improvement immediately abutting the property of such owner, pay into the City Treasury the full amount of said assessment, or shall have the right \* \* \* in case of the improvement of streets to have such assessment divided into ten (10) equal annual payments; the first installment thereof shall be due thirty (30) days after the date of the completion and acceptance by the City Council of such improvement immediately abutting his property, and the remaining installments shall be due in equal amounts, due respectively in 1, 2, 3, 4, 5, 6, 7, 8 and 9 years from the date of the first installment \* \* \* provided that such owner in either of such cases shall have the right at any time to anticipate any or all of such installments.

Section 2 of the Ordinance provides "that all assessments hereby levied shall be a lien upon the property so assessed," and that the assessments be entered in a book of assessment liens and that "such liens shall continue from the date of the entry of the same on such assessment lien book, until five (5) years after the date provided for the final payment, unless sooner paid.

The case involves the effort of the City of Orangeburg to foreclose a lien for an assessment for street improvements which was begun in the State Court and removed to the Federal District Court. The City raised the question of jurisdiction but both the District Court and the Circuit Court of Appeals affirmed the jurisdiction assumed.

Thereafter, the case came to trial upon its merits. The District Court, at a hearing held to consider the second defense of the defendant, namely, that the lien of the City had expired prior to the institution of the suit, held that the second defense was not good. The case thereafter came to trial in the District Court without a jury and resulted in a verdict in favor of the City of Orangeburg.

From this verdict the defendant appealed and the case was heard by the Circuit Court of Appeals for the Fourth Circuit and the judgment of the District Court was reversed.

The plaintiff, the City of Orangeburg, petitions for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit.

### **Questions Presented**

1. Whether the Circuit Court of Appeals erred in reversing the District Court by declaring that the assessment lien of the City of Orangeburg had expired prior to the commencement of its action.
2. Whether the Circuit Court correctly interpreted and applied the Constitution and Statutes of the State of South Carolina relating to the authority of the City of Orangeburg to assess abutting property for public improvements.
3. Whether the Courts had jurisdiction of the res real estate or the cause of action.

### **Statutes Involved**

Article X, Section 16, Constitution of South Carolina of 1895 (R. 34).

Act No. 345, Acts of 1915, page 586, of the General Assembly of the State of South Carolina (29 Stat. at Large, 586) (R. 34-35).

Ordinance of the City of Orangeburg (R. 35-38).

### Statement

The City of Orangeburg brought an action against the Southern Railway Company to foreclose a street improvement assessment lien.

The Southern Railway, a Virginia corporation, removed the action to the Federal District Court.

The City then brought a similar action in the State Courts against the Southern Railway, Carolina Division, a South Carolina corporation, and other companies, all South Carolina corporations, to foreclose the same lien upon the same real estate. The Southern Railway, the Virginia corporation, was not a party to this action.

The District Court, upon petition of the Southern Railway, and after a hearing, enjoined the City from proceeding with the action against the Southern Railway, Carolina Division, the South Carolina corporation, in the State Courts while the suit against the Southern Railway "is pending" (R. 1).

From this order of the District Court the City appealed, questioning the jurisdiction of the District Court upon two grounds: (1) that the real estate had not come within the jurisdiction of the Court by any levy or seizure and that failure to serve the summons and complaint on the Southern Railway, Carolina Division, the owner of the real estate, was fatal to jurisdiction; and (2) that the owner of real property, the object of a foreclosure proceeding, is an indispensable party, without whom the Court cannot proceed even if making the owner a party will destroy the diversity of citizenship upon which the jurisdiction of the Court depends.

These issues were decided against the City by the Circuit Court of Appeals for the Fourth Circuit (R. 25-33), which affirmed the District Court. Thereafter, the case came to hearing and trial on its merits on the issues raised between

the City of Orangeburg and the Southern Railway Company, a Virginia corporation. The Southern Railway, Carolina Division, a South Carolina corporation, was not a party to the proceedings.

The District Court, at a special hearing, heard the parties on the Second Defense of the defendant, Southern Railway Company, because it was agreed that if the City had lost its lien, it would be useless to go into the other allegations and defenses in a lengthy trial.

The Second Defense alleged the expiration of the lien prior to the institution of the action and was as follows:

**"FOR A SECOND DEFENSE**

"That if any valid assessments were ever levied against the property mentioned and described in the complaint, the said assessments became due and payable on the 15th day of January, 1927, and constituted a lien on the said property for a period of five years, at the expiration of which time, to-wit, January 15, 1932, or thereafter and prior to the institution of this action, the said lien expired, and plaintiff now has no interest in or claim upon the real estate mentioned and described in its complaint for any street improvement assessments."

The District Court, however, overruled this defense and struck it from the answer (Opinion, R. 45-53).

Subsequently, the cause came to trial on its merits in the District Court, without a jury, and resulted in a judgment for the plaintiff, the City of Orangeburg (Opinion, R. 53-74).

The defendant company appealed, raising several issues. The Circuit Court of Appeals, without passing upon the other issues, reversed the judgment of the District Court as to the Second Defense (R. 94-102).

## Specifications of Errors to Be Urged

The Court below erred:

- (1) In holding that the assessment of the City for street improvements was due at the end of a thirty-day period and that the limitations began to run from that point of time.
- (2) In holding that the life of the City's lien for paving assessments, created by ordinance under constitutional authorization, is dependent upon the action or nonaction of a property owner.
- (3) In holding that the District Court acquired jurisdiction of the real estate by virtue of Summons and Complaint served only on the Southern Railway Company, the lessee of the real estate.
- (4) In holding that the Southern Railway, Carolina Division, owner of the real estate, is not an indispensable party to the action, whose joinder would destroy the diversity of citizenship upon which the Court's jurisdiction depended.
- (5) In reversing the decision of the District Court (R. 45-53) that the second defense set out in the answer, namely, that the case is barred by lapse of time, cannot be sustained and that such portion of the answer be dismissed and not considered upon the trial of the cause on its merits.

## Reasons for Granting the Writ

The Circuit Court of Appeals has decided, and we submit has incorrectly decided, a question of great importance to the City of Orangeburg and other municipalities which, for various reasons, have been lenient and indulgent to owners of property assessed for street improvements.

The decision of the Circuit Court of Appeals, reversing the decision of the District Court, determines an important

question of local law in a way, we respectfully submit, that is probably in conflict with applicable local decisions.

The effect of the decision will be to permit the defendant, a foreign corporation, to avoid the payment of an assessment for street improvements under the interpretation of the Federal Court while other property owners, under the decisions of the State Courts, will have to pay similar assessments. This represents a grave discrimination against citizens and prevents equal application and administration of the law to citizen and noncitizen alike.

#### 1-2. LIMITATIONS AND THE LIFE OF THE LIEN

The ordinance plainly provides (R. 29-30) that a property owner can pay the assessment in several ways: (1) "may within thirty days" \* \* \* pay \* \* \* the full amount; (2) "shall have the right" \* \* \* "to have such assessment divided into ten equal payments," the first of which "shall be due in thirty days" and the others in nine annual installments; (3) "shall have the right at any time to anticipate any or all of such installments."

Nothing in the ordinance requires the owner to pay the full assessment within thirty days or gives the municipality a cause of action against the owner for failure to make full payment within thirty days. The ordinance says the owner "may" so pay, if he wishes to do so, but there is not the slightest suggestion that the owner will be in default and his property subject to immediate public sale if he does not pay in full within the thirty days.

The Circuit Court of Appeals, however, holds that "the whole assessment is due at the end of the thirty day period and the limitations began to run from that point of time, unless the property owner affirmatively exercises the right to pay in installments" (R. 98).

The Court bases its interpretation upon the decision of the Supreme Court of South Carolina, in *Cleveland v. City*

of Spartanburg, 185 S. C. 373, where the Court held that a similarly-worded ordinance, when considered with the enabling act applicable to Spartanburg, gave the owner the right to installment payments "only when she choose to exercise it by complying with the ordinance provisions which conferred it" and added that "she did not do so" (R. 99).

The City of Spartanburg secured "its authority to make the assessment in question to the Act of Feb. 17, 1911 (Vol. 27 S. C., St. at Large, p. 557)" (R. 99). The City of Orangeburg secured its authority from Act X, Section 16 of the Constitution of South Carolina of 1895 (R. 34), and Act No. 345 of the General Assembly of the State of South Carolina, 1915 (29 Stat. at Large, 586) (R. 34). The Spartanburg Act (R. 91) is radically different from the Orangeburg Act and the General Act of 1915 (S. C. Code 1932, Section 7374) (R. 15) which controlled in the case of *Town of Cheraw v. Turnage, et al.*, 184 S. C. 76, 191 S. E. 831.

What is the difference? The General Code provision (Sec. 7374) provides that times and terms of payment, and rates of interest on deferred payments "shall be such as may be prescribed by ordinance." This gives the property owner no option but to make payments according to the ordinance.

The Spartanburg Act, which specifically applies to four municipalities, not including the City of Orangeburg, provides, with reference to deferred payments by lot owners, that they "may be agreed upon as prescribed by ordinance." This gives the property owner in Spartanburg the right to accept or reject deferred payments or installments.

The Orangeburg Act authorized the City "to levy an assessment upon abutting property for the purpose of paying for permanent improvements on streets immediately

abutting such property." No limitation whatever is placed upon the power given the City of Orangeburg, either by the Constitution or the Act. Under the Act and ordinance of the City of Orangeburg, no rights whatever were given the property owner as to accepting or rejecting deferred payments.

The Supreme Court of South Carolina, in the *Cleveland* case, *supra*, emphasizes this difference, saying: "The City of Spartanburg, under the Enabling Act in this case, is given power to prescribe by ordinance, times and terms of payment with reference to deferred installments, which the lot owner may or may not accept." It points out that, in the Spartanburg statute, the "significant words are used, 'may be agreed upon' and not the words, 'shall be.' Nor does it contain the expression, 'payment of assessments by such property owners *shall be* such as may be prescribed by ordinance,' which we find (Code #7374) in the *Cheraw* case above referred to."

"Under the terms of the Constitution and Enabling Act, the City of Orangeburg has full power to provide by ordinance for the terms and methods of payment," declares the District Court (R. 49), "and, therefore, we do not have to look further than the language of the ordinance itself to determine when the lien expired."

This is, your petitioner submits, correct. The Circuit Court, however, in considering the Orangeburg Ordinance, superimposes the limitations contained in the Spartanburg Act by applying the interpretation that the Supreme Court of South Carolina placed upon the Spartanburg Ordinance and Act, when considered together. This is obviously unjust to the City of Orangeburg, and not in accordance with the laws of South Carolina, as enacted by the General Assembly and interpreted by the Supreme Court.

The Orangeburg Ordinance provides (Section 2, R. 37) that the assessment "lien shall continue \* \* \* until five years after the date provided for the final payment, unless sooner paid." Obviously, "the final payment" refers to the last installment and, consequently, "the date provided for the final payment" of installments for street improvement was the date provided for the tenth, or final payment.

Inasmuch as "the due date of the last payment under the installment plan was January 15, 1936" (Opinion of Circuit Court, R. 97), it would appear that the lien of the City continued for five years after January 15, 1936, or until January 15, 1941. Inasmuch as the instant suit was filed on December 14, 1940, it would appear that the lien was then alive.

The Circuit Court ruled, however, that the five-year period runs from January 15, 1927, which was thirty days after completion and acceptance of the work. Here, again, the Circuit Court relies upon the *Cleveland* case and the interpretation of the Spartanburg Act and Ordinance. It should be noted that the lien of the City of Spartanburg, as fixed by Section 3 of the Spartanburg Ordinance continued "until the expiration of five years from the date when the final payment is due and payable, unless sooner paid" (R. 40).

The final payment, in the *Spartanburg* case, was "due and payable" in thirty days, if the property owner did not agree upon the terms of deferred payments and in four years and thirty days if the property owner accepted the plan for deferred or installment payments. The life of the Spartanburg lien apparently fluctuated in accordance with acceptance or rejection of the installment plan.

The Orangeburg Ordinance is more definite. It creates a lien for five years after the date "provided for the final

payment." The life of the potential lien is not variable. Regardless of any action, or non-action, on the part of the Orangeburg property owner, the lien exists for five years from the date provided for the final payment.

The life of the Orangeburg lien would not be shortened, even if the property owner had to affirmatively accept the installment plan. The date provided in the Ordinance "for the final payment" would remain constant and unchanged even if the property owner had the right to reject, and actually rejected installment payments. Nor would the life of the lien be shortened by the declaration of a property owner that he did not intend to pay the assessment or by allegations that the assessment was unconstitutional, the improvement not beneficial and the petition improperly signed. These allegations, if properly sustained, would defeat the right of the City to collect the assessment but could not affect the life of the lien of a valid and legal assessment.

"There is a disagreement, at least in result, among the cases as to the effect of failure formally to elect to pay a special assessment in installments as rendering the entire assessment payable at once so as to start the statute of limitations running against the enforcement of the assessment," declares American Jurisprudence, Vol. 48, page 746.

The confusion arises, in part at least, because some enabling statutes, like that applicable to the City of Spartanburg, "merely provides that the times and terms of payment of deferred payments may be 'agreed upon'" by ordinance, and others make a "request" from the property owner necessary to the adoption of the installment plan. (Annotation, 114 A. L. R., p. 399-400).

"Under statutes expressly authorizing enforcement of special assessments until a designated time after maturity of the last installment thereof, it has been held that the

lien of the assessment is not lost until the expiration of the period indicated, and that earlier installments thereof may be collected at any time within that period.”—114 A. L. R., p. 402.

The Orangeburg ordinance established a lien “for five years after the date provided for the final payment.” The enabling act, applicable to Orangeburg, unlike the act applicable to Spartanburg, does not provide that payments “may be agreed upon.” It does not make installment payments contingent upon a “request” from property owners.

The decision of the Supreme Court of South Carolina in *Cleveland v. Spartanburg*, 185 S. C. 373, 194 S. E. 128, referred to by the Circuit Court of Appeals, and the companion case of *Blake v. Spartanburg*, 185 S. C. 398, 194 S. E. 124, plainly hinges on the statutory provisions requiring the agreement of property owners to installment payments. The latter case says:

“Under the statute, the City (of Spartanburg) does not have the right to divide the assessment into installments, but only to pass on ordinance as to deferred payments, which payments may be agreed upon by the City and the property holder. It seems \* \* \* that the part quoted of section 1, of the Act of 1911, clearly contemplates there must be an agreement between the property holder and the City.”

The Spartanburg Ordinance, attempting to automatically set up the installment payment plan, was ultra vires because it conflicted with the statute, which required agreement on the part of the property owner. This limitation is not applicable to the City of Orangeburg, and its power, in relation to installment payments provided in its ordinance, should not be denied because a similar provision in the Spartanburg ordinance exceeded the authority given to that municipality by statute.

## (3-4) THE QUESTION OF JURISDICTION

The case of the City of Orangeburg against the Southern Railway Company was originally instituted in the State Court but was removed to the Federal Courts by appropriate action.

The City of Orangeburg, in attempting to foreclose a paving assessment lien against the real estate described in the complaint, attempted to secure jurisdiction of the real estate through a proceeding in rem by the service of a summons and complaint on the sole defendant, Southern Railway Company, a Virginia corporation, in the State courts. The defendant filed its petition and bond and removed the cause to the jurisdiction of the Federal District Court.

Thereafter, the City asserts it discovered that the defendant was the lessee of the real estate and not the owner of the fee. Thereupon, it instituted a second cause of action against certain South Carolina corporations, including the Southern Railway, Carolina Division, a South Carolina corporation, lessor of the real estate held by the Southern Railway Company, the Virginia Corporation, as lessee.

The Southern Railway Company filed a petition with the District Court, praying that the City of Orangeburg be restrained from proceeding with the action in the State Court. The matter was heard by Judge J. Waties Waring, of the Federal District Court, who issued an order, enjoining and restraining the said City from attempting to enforce its lien or from taking any action and steps other than in the case that had been removed to the Federal Court (R. 1).

The City of Orangeburg, in its return, alleged that its paving assessments were levied solely and exclusively upon

the owners of the property immediately abutting the streets improved. (R. 21, par. 11); that the Southern Railway Company held the real estate "under a lease for a term of years;" (R. 21, par. 12); that because the owner of the real estate was not served with the summons and complaint the court "acquired no jurisdiction whatever over the real property described in the complaint" (R. 21; par. 12); that the failure to serve the summons and complaint upon the actual owner of the real estate, was fatal to jurisdiction in an action in rem, in the absence of any levy or other summary process.

The District Court decided this question adversely to the plaintiff and appeal was had to the Circuit Court of Appeals for the Fourth Circuit. In its opinion (R. 25-32), the Circuit Court affirmed the decision of the District Court.

The City of Orangeburg, in its appeal to the Circuit Court, also asserted that the Southern Railway, Carolina Division, a South Carolina corporation, the lessor of the real estate, was "an indispensable party to the suit in the Federal Court because it has an interest in the property of which it cannot be deprived unless by due process it is summoned and given an opportunity to be heard" and that its joinder "would destroy the diverse citizenship on which the jurisdiction is based and require the dismissal of the suit." (Opinion of Circuit Court of Appeals, R. 29, par. 2).

The Circuit Court of Appeals held that the questions at issue "may be decided in the absence of the Southern Railway, Carolina Division, without in any way jeopardizing its interest" and also that "if this corporation should be enjoined as a party at the present stage of the controversy the District Court would not lose jurisdiction."

The petitioner respectfully suggests that this is not in conformity with the decision in the case of *Baltimore and Ohio Railroad Company v. City of Parkersburg*, 268 U. S. 35; 45 S. Ct. Rep. 382.

### Conclusion

It is respectfully submitted that a writ of certiorari should be granted.

JULIAN S. WOLFE,  
HUGO S. SIMS.

Dated: February 9, 1945.

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CLERK

Brief of Respondent

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CITY OF ORANGEBURG,

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BRIEF OF RESPONDENT OPPOSING PETITION FOR A  
WRIT OF CERTIORARI TO THE UNITED STATES  
CIRCUIT COURT OF APPEALS FOR THE FOURTH  
CIRCUIT.

---

FRANK G. TOMPKINS,  
ADAM H. MOSS,  
*Counsel for Respondent.*

CIRCUIT COURT OF APPEALS FOR THE EIGHTH  
CIRCUIT OF THE UNITED STATES FOR THE FORTY-EIGHT  
STATE OF MISSOURI

APRIL 19, 1948  
FEDERAL BUREAU OF INVESTIGATION  
U.S. DEPARTMENT OF JUSTICE

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**Brief of Respondent**

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**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1944**

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**Opinions Below:**

The Restraining Order of the District Court, is found at R. 1.

Opinion of the District Court for the Eastern District is reported in 45 Fed. Sup. 734, (R. 2-14).

Opinion of the United States Circuit Court of Appeals is found in 134 Fed. (2), 890, (R. 25-32).

Opinion of the District Court is reported in 55 Fed. Sup. 167, (R. 45-53).

Opinion of the District Court for the Eastern District of South Carolina, is reported in 55 Fed. Sup. 171, (R. 53-74).

Findings of Fact, (R. 74-75).

Conclusions of Law, (R. 76).

Order, (R. 69-70).

Opinion of the United States Circuit Court of Appeals is found in 145 Fed. (2d) 725, (R. 94-102).

### **Questions Involved**

1. Did the lien of the paying assessment expire previous to the time suit was instituted?
2. Did the Court have jurisdiction of the *res*?

### **Statutes Involved**

Article X, Section 16, Constitution of South Carolina of 1895 (R. 34).

Act No. 345, Acts of 1915, page 586, of the General Assembly of the State of South Carolina, (29 Stat. at Large, 586). (R. 34-35).

Ordinance of the City of Orangeburg, (R. 35-38).

### **Statement**

This action was instituted in the Court of Common Pleas for Orangeburg County, South Carolina, by the service of a summons and complaint therein on December 14th, 1940. Thereafter, on the second day of January, 1941, the action was removed to the United States District Court for the Eastern District of South Carolina, on the ground of diversity of citizenship.

The suit was for the purpose of foreclosing an alleged lien on certain land which was used by the respondent as a right-of-way for railroad purposes, which said lien arose out of assessments levied for the purpose of paying for street improvements abutting said property.

Thereafter, to-wit, on the 14th day of January, 1941, the petitioner brought another action in the Common Pleas Court for Orangeburg County, to which suit respondent was not a

party, against Southern Railway-Carolina Division, a South Carolina corporation, alleging that the said corporation was the real owner of the land involved, and at the same time, the petitioner attempted to levy an execution on the same lands. The respondent then, by petition in the United States District Court, sought to have the further prosecution of the suit against Southern Railway-Carolina Division and the attempted levy enjoined, on the ground that the United States District Court had jurisdiction of the *res* and that the State court was without authority to proceed further in the cause.

The matter came on to be heard before the United States District Court for the Eastern District of South Carolina, and on June 25th, 1942, that Court rendered an opinion holding that it had jurisdiction of the *res* (R. 13) and ordered that the City of Orangeburg and its tax collector be enjoined "from taking any further action and steps in said cause so long as the instant suit in this court is pending; and that they further be enjoined and restrained from doing or performing any acts by way of summary process or in any other manner, or proceeding attempting to enforce the said claim or lien for street improvements other than in the instant case in this Court." (R. 1).

The petitioner herein appealed from that decision to the Circuit Court of Appeals for the Fourth Circuit, which on April 12, 1943, affirmed the decision of the lower Court, holding that the Southern Railway-Carolina Division was not an indispensable party to the action, and that the issues involved could be decided in its absence without in any way jeopardizing its interests. (R. 32). This decision was based upon the undisputed fact that Southern Railway Company held the property involved under a lease for 999 years executed on June 30, 1902, (R. 28), which lease provided that the said Southern Railway Company would discharge all of the duties and obligations imposed by the states through which it operated, or other authorities, and that it would not permit any claim to be created by its act or neglect against the lessor which might be adjudged to be a lien upon the

property of Southern Railway-Carolina Division, its lessor. (R. 23).

In pleading to the merits of the case, the respondent set up as its second defense that the suit was barred by the statute of limitations and the assessment was no longer a valid lien against the property by reason of the fact that the ordinance under which it was laid provided that the lien should expire within five years from the date on which the final payment should become due, unless sooner paid. (R. 36). The District Court at a special hearing, considered this defense, and by its order dated February 7th, 1944, (R. 45-53), ordered it stricken from the answer.

The case then came on for trial on the merits, on other defenses raised by respondent's pleadings, at which time respondent attempted to renew its second defense, but the Court overruled it. (R. 47). The trial resulted in a verdict for the petitioner for the full amount of the alleged assessment, with interest. (R. 76-77).

The respondent proved that the petition of the abutting property owners was filed on April 10th, 1925, and that thereafter, on the 20th day of July, 1925, it served upon the City of Orangeburg a notice that it would "decline and refuse to pay any portion of such paving assessment which may be levied against it by reason thereof". (R. 82). In spite of this notice, however, and in spite of the fact that the paving was laid and accepted by the City on December 16th, 1926, under an ordinance which provided that "Each owner of the property so assessed may, within thirty days after the completion and acceptance by City Council of such improvement immediately abutting the property of such owner, pay into the City Treasury the full amount of such assessment, or shall have the right \* \* \* to have such assessment divided into ten equal payments," (R. 36), the city failed to take any action to enforce its lien until December 14th, 1941, when this action was instituted.

The respondent herein appealed from the decision of the District Court to the Circuit Court of Appeals for the Fourth Circuit, both from the refusal of the District Court to sustain

its second defense and from errors assigned arising out of the trial of the cause on its merits generally. The District Court on November 11th, 1944, rendered its opinion in which it stated that whereas the other questions raised by the respondent were important and would call for careful examination, these questions would not be considered because of the fact that they were of the opinion that the "lien of the assessment, even if originally valid, cannot now be enforced against the Railway Company because the pending suit was not brought until after the expiration of the five year period during which the lien was continued and kept alive by the terms of the assessment ordinance." (R. 95).

### **Reasons for Refusing the Writ**

Petitioner sets out that this Court should grant a *writ of certiorari* for the reason that the Circuit Court of Appeals has decided an important question of local law in a way that is probably in conflict with applicable local decisions. We contend, and shall endeavor to show that rather than being in conflict with local decisions, the Circuit Court of Appeals has followed the law as laid down by the Supreme Court of South Carolina.

Petitioner makes the statement, in assigning reasons for granting the writ, that the effect will be to permit a foreign corporation to avoid the assessment for street improvements. We call to the Court's attention the fact that the citizenship of the respondent has had nothing to do with the merits of the case, other than to give it the right to go into the United States District Court, rather than to try the case in the State Courts, and therefore in no wise represents a discrimination against citizens of the state.

#### **1. LIMITATIONS AND THE LIFE OF THE LIEN**

The sole question here involved is whether or not the lien had expired by its own limitations at the time suit was instituted. We think, as a matter of fact, the opinion rendered by the Circuit Court of Appeals on November 11, 1944,

(R. 94-102) fully answers all of petitioner's contentions. We shall endeavor, however, more explicitly to show why this decision is not in conflict with the local decisions.

On December 16, 1926, the paving of South Boulevard or South Railroad Avenue, was completed and accepted by the City of Orangeburg, and one-third of the cost of the paving abutting the property described in the complaint was entered upon the book of "Assessment Liens" and assessed against the defendant.

The assessment was made by the City pursuant to authority contained in Article X, Section 16 of the Constitution of South Carolina (R. 34), Act No. 345 of the South Carolina Acts of 1915 (R. 34-35) and an ordinance passed by the City Council of Orangeburg on the 12th day of July, 1918. (R. 35-38). No payments were ever made on the assessment, and the City took no steps to enforce the collection of its assessments until it brought this suit on December 14, 1940.

Although the Act of 1915 mentioned above authorized the City to levy such assessments, nothing is said in it about how such assessments shall be paid. In fact, the Act is in the identical words of the Constitutional provision hereinabove mentioned. In view of the fact that the Supreme Court of South Carolina has held that such provisions of the constitution are self-executing and need no enabling legislation, we may dismiss the provisions of the Act itself from consideration. *Beatty vs. Wittekamp, et al.*, 171 S. C. 326; 172 S. E. 422; *Town of Cheraw vs. Turnage, et al.*, 184 S. C. 76, 191 S. E. 381.

Under the provisions of the ordinance, the lien of the paving assessment expired five years after the date provided for final payment, unless sooner paid. Petitioner contends that the date for final payment was nine years from January 15, 1927, and that the lien did not expire for five years from that time. Respondent contends that the day of final payment was thirty days from the time the paving was accepted by City Council, and that the lien expired five years from that date, or on January 15, 1932.

In two recent cases, *Clereland vs. City of Spartanburg*, 185 S. C. 373, 194 S. E. 128, and *Blake vs. City of Spartanburg*, 185 S. C. 398, 194 S. E. 125, the Supreme Court of South Carolina had under consideration an ordinance practically identical with the one here involved, which ordinance provided:

"When said assessment roll has been ratified in the manner prescribed, each owner of property so assessed may, within thirty days after such ratification, pay into the City Treasury the full amount of such assessment, or shall have the right to have such assessment divided into five equal payments, the first installment thereof shall be due thirty days after the date of the ratification of the assessment roll by the City Council, and the remaining installments shall be due in equal amounts, due respectively in one, two, three and four years, from the date of the first installment, \* \* \*". (R. 40, Par. 4).

The material portion of the Orangeburg ordinance under consideration in this case, reads as follows:

"Each owner of the property so assessed may, within thirty days after the completion and acceptance by City Council of such improvement immediately abutting the property of such owner, pay into the City Treasury the full amount of such assessment, or shall have the right \* \* \* in case of the improvement of streets to have such assessment divided into ten equal payments; the first installment thereof shall be due thirty days after the date of the completion and acceptance by City Council of such improvement immediately abutting his property, and the remaining installments shall be due in equal amounts, due respectively in one, two, three, four, five, six, seven, eight and nine years from the date of the first installment, \* \* \*". (R. 36, Par 2).

Mr. Justice Fishburne, in deciding that the lien of the assessment had expired, construing the Spartanburg ordinance, in the *Clereland case, supra*, said:

"It is argued on behalf of the City that the failure of the plaintiff to pay the whole amount of the assessment within thirty days is a substantive fact, evidencing her desire to take advantage of her right to pay in installments. The words 'right to have' (Section 4 of the ordinance) with reference to installment payments, contemplate some positive action on the part of the property owner evidencing a choice of option. Non-action on the part of the property owner does not indicate an election, nor does such inaction, under these circumstances, give the right to make an election for the property owner. Under the ordinance this right resided in the plaintiff, and it could be given vitality only when she chose to exercise it by complying with the ordinance provisions which conferred it. She did not do so. The ordinance laid no compulsion on her to do so; nor does it give the City, in the absence of her agreement and compliance, the right to arbitrarily place her in the deferred payment class. Upon her failure to adopt the installment payment plan, which was optional, the whole amount of the assessment became payable within the 30-day period allowed. When she failed to pay it, the City's cause of action accrued.

"Under the ordinance, the plaintiff could have adopted either course, but she did neither, and in our opinion the City's right of action accrued at the end of the 30-day period, and the life of the lien expired 5 years thereafter, to-wit, in 1933."

The petitioner, in its brief, makes much of the fact that under the enabling Act the property owners of Spartanburg were entitled to such terms as to deferred payments, as "may be agreed upon as prescribed by ordinance". We fail to see how this differentiates it from the case at bar.

The Supreme Court of South Carolina went on further to say in the *Cleveland case, Supra*:

"As was said in 44 C. J. 3420, \* \* \* Such provisions (the payment of assessments in installments) are gen-

erally construed to confer on a property owner an option to pay in installments, and not to require him to do so or to prevent him from paying the whole assessment at any time by paying the amount thereof and such interest as he is liable for, at the time of payment, under a proper construction of the statute. It is proper to attach just and reasonable conditions to the privilege of paying in installments, such as that the owner shall give a bond, waive non-jurisdictional defects and informalities in the proceedings and pay interest on the deferred installments; and the privilege is not available to the property owner unless he complies with the conditions and exercises the option within the time prescribed."

In construing the Spartanburg ordinance, the Court considered the enabling Act. However, what effect, if any, this Act had upon the meaning of the ordinance is immaterial here, since the Court took occasion, in the same case, to construe the *words* of the ordinance alone, which, as we have pointed out, require some positive action evidencing a choice of option on the part of the landowner in order to put the deferred payment plan in effect.

As was said in *Blake vs. City of Spartanburg*, 185 S. C. 398, 194 S. E. 125.

"Where the landowner requests the privilege of paying an assessment in installments over a period extending beyond the limitation period, according to an optional plan provided by statute, he cannot then set up the statute of limitations as a bar to an action for an installment after the limitation period.

"But if the landowner makes no request and is not estopped from denying the making of such request, the mere adoption by the City of the installment plan will not operate to extend the statutory limitation period."

We think that Mr. Justice Soper, speaking for the Circuit Court of Appeals was correct when he stated (R. 98):

"\* \* \* It is not reasonable to conclude in the case of a property owner, who denies all liability, that the City cannot sue for the full amount thirty days after the work has been accepted, but can only sue for each installment, as it becomes due under the installment plan, over a period of nine years. Indeed we think that in any case, whether the property owner has refused to pay the assessment or not, the whole assessment is due at the end of the thirty day period, and the limitations began to run from that point of time, unless the property owner affirmatively exercises the right to pay in installments."

We respectfully contend that the decision of the Circuit Court of Appeals was in full conformity with the decisions of the Supreme Court of South Carolina involving this same question, and that the *writ of certiorari* should be denied.

## 2. THE QUESTION OF JURISDICTION

Petitioner contends that because the respondent, Southern Railway Company, is merely a lessee, under a lease running from June, 1902 for 999 years, and because this is an action in *rem*, the United States District Court was without jurisdiction to hear or decide the matter. The question at issue is really whether or not Southern Railway-Carolina Division, the South Carolina corporation which acquired whatever interest in the land the original railroad or railroads had, is an indispensable party. The District Court held that the respondent certainly "had a very decided interest in this land since it was actually in occupancy thereof, using it for railroad purposes, and was the holder of a lease which was to run for a term of nine hundred and ninety-nine years from 1902." (R. 9). This lease, as heretofore pointed out, required that the respondent corporation should discharge all of the duties and obligations which may be lawfully imposed by the states or other authorities, upon the South Carolina Corporation (i.e. Southern Railway-Carolina Division) as the owner and lessor of the demised lines of rail-

road and the respondent company specifically agreed under the terms of the lease that it would not permit or suffer any claim or demand to be created by its act or neglect which might be adjudged to be a lien upon the property of the South Carolina Corporation. (R. 23).

The Circuit Court of Appeals, in its opinion discussing this phase of the question, said (R. 28) :

"It is obvious that by this transfer the Southern Railway Company became the virtual owner of the property even though it be considered that under the South Carolina decisions the technical relationship between the parties to the lease is that of lessor and lessee. *Columbia Ry., Gas & Elec. Co. vs. Jones*, 119 S. C. 480, 112 S. E. 267. The taxing statutes of the State treat the relationship of the lessee to the land in such a conveyance realistically, for Sec. 2687 of the South Carolina Code provides that all leasehold estates held on perpetual lease or for a term renewable forever at the option of the lessee shall be valued for taxation at the full price of the land and continue to be taxed as such to the end of the term. In the light of the rights and duties of the Southern Railway Company under the lease and under the taxing statutes of South Carolina, and in view of the nature of the suit to enforce the lien of an assessment disclosed in *Town of Cheraw vs. Turnage*, *supra*, there can be no doubt that the Southern Railway Company had such an interest in the property as to justify the institution and maintenance of the suit against it without the joining of the Southern Railway-Carolina Division as joint defendant. In that suit the validity of the assessment can be determined, the extent of the obligation resting upon the party bound to pay all taxes and assessments can be ascertained, and, if necessary, the lien of the assessment can be enforced by the sale of an interest in the land which for all practical purposes amounts to complete ownership."

The District Court in its opinion said, moreover, with reference to the ownership of the land, (R. 5, Par. 3) :

"From the foregoing it will appear that there seems to be a grave doubt as to who is the actual owner of the fee to the land in question. In the argument it was generally admitted that it was uncertain whether the fee in these lands was ever acquired by any one or more of the railroad companies hereinabove named or any of their predecessors, but that they did hold rights for the use thereof for railroad purposes and the lands had been devoted to such use. The lands are at present in the actual possession and control of the Southern Railway Company under this long term lease and it is using and exercising all of the rights and franchises acquired under its lease and held by its predecessors in and to this land."

If what is said in the quotation next above respecting the fee to the land be true, it would appear from the foregoing, therefore, that even if it were to be held that the interest of Southern Railway Company is not sufficient to give the Court jurisdiction of the *res*, the same defect would be present in any suit against the South Carolina Corporation and its predecessors in title, and the petitioner would have to search out those persons who at this time may actually own the fee in the land and to whom it would revert when it is no longer used for railroad purposes, and join them as indispensable parties.

Petitioner asserts in its brief that the decisions of the Courts below are not in conformity with the decision in the case of *Baltimore and Ohio Railroad Company vs. City of Parkersburg*, 268 U. S. 35, 45 Sup. Ct. Rep. 382, 69 L. Ed. 834. An examination of that case shows that it is entirely different from the one at bar. In that case, the Baltimore & Ohio Railroad, which has acquired all the stock in a West Virginia railroad and operated it under the name of Parkersburg Branch Railroad Company, sued the City of Parkersburg in the Federal Court to enforce an exemption from municipal taxation which the Northwestern Virginia Railroad Company, predecessor in title to the Parkersburg Branch Railroad Company, had acquired from the City.

The United States Supreme Court held in effect that the contract was the property of the Parkersburg Branch Railroad, and therefore if the Baltimore & Ohio was suing as the corporate owner of the property, but under the name of the Baltimore and Ohio, there was no diversity of citizenship so as to give the Federal Court jurisdiction, but that if it were suing in its own name, as owner of the Parkersburg Branch, the Parkersburg Branch was an indispensable party without whom the suit could not be prosecuted. There was no question there involved as to whether or not the Baltimore & Ohio Railroad was actually in possession of the *res* as here; in fact the Court inferred that it was not, but that the property at all times remained in the possession of the Parkersburg Branch.

It is worthy of note that this particular case was cited by the Circuit Court of Appeals in its opinion holding that the Federal Court had obtained jurisdiction and that the South Carolina Corporation was not an indispensable party. (R. 30).

In conclusion, we think that the opinion of the District Judge, filed June 25th, 1942, (R. 2-14) and the Opinion of the Circuit Court of Appeals, filed April 12, 1943 (R. 26-32), are irrefutable answers to petitioner's contention that the United States Court has not jurisdiction in this cause.

### Conclusion

It is respectfully submitted that the *writ of certiorari* prayed for by petitioner should be refused.

FRANK G. TOMPKINS,  
ADAM H. MOSS,  
Counsel for Respondent.